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FEDERAL COMMUNICATIONS COMMISSION
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Before the
FEDERAL COMMUNCATIONS COMMISSION
Washington, D.C. 20554

In the Matter of	)	
	)	
Implementation of the Pay Telephone	)	**CC Docket No. 96-128**
Reclassification and Compensation	)	
Provisions of the Telecommunications	)	
Act of 1996	)	

REPLY COMMENTS OF SPRINT CORPORATION ON REMAND ISSUES

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SUMMARY

The Commission should dispel the concerns expressed by other parties, that it does not understand or take seriously the Court's remand, by carefully considering the evidence of record and prescribing a cost-based default rate for compensation.

Many parties share Sprint's view that the marginal cost approach originally proposed in the NPRM is worthy of further consideration. However, if the Commission takes a fully allocated approach to costs, then the appropriate per-call rate is in the range of $.057-$.067. This range uses, as a starting point, the local coin costs reported by NET in Massachusetts. These coin costs should be reduced by $.05 for the cost of local call completion that is not involved in the calls here at issue, by $.03 for premises owner commission expense which should not be allocated to these calls, and by $.02-$.03 to reflect a conservative estimate of the costs related to coin functionality.

The Commission cannot use, as a starting point for a cost analysis, either the local coin rate or its earlier assumption that $.35 represented an appropriate default rate for a "market-based" local coin rate. The $.35 rate does not reflect record evidence that the deregulated local coin rate in many areas is below that level. In any case, there is also no reason to assume (as the Commission previously did) that the deregulated local coin rate is reflective of the costs of a local coin call. On the contrary, evidence submitted by NET in Massachusetts suggests that "market-based" local coin rates may be as much as 50% above underlying costs.

The Commission should reject, out of hand, the "market-based" approaches to payphone compensation advocated by the PSPs. The Commission previously determined

not to rely on such approaches and should not attempt to revisit that issue here. In any event, the measures advanced by the PSPs for a "market-based" rate are irrelevant to the question of what an IXC would willingly pay a PSP for an access code or subscriber 800 call. Until the Commission interfered in that "market" by ordering IXCs to pay compensation for dial-around calls, the market rate was zero.

Alternatively, if the Commission does not accept Sprint's view that the market-based price between IXCs and PSPs is zero, then it should look to the only other "market" test – what consumers would willingly pay for the convenience of placing an access code or subscriber 800 call from a payphone – and revisit the "caller pays" approach to compensation through a further notice of rulemaking.

With respect to revisions to the interim compensation plan, any such plan should be based upon a cost-based default rate applied to the same number of calls (131 per month) used by the Commission in its earlier plan. All carriers subject to per-call compensation (i.e., all switch-based carriers), should be required to contribute to interim compensation. The most reliable basis for distributing this interim compensation among this enlarged class of payors is to have each payor divide one month's actual number of compensable calls (after per-call compensation takes effect) by the total number of payphone ANIs in order to calculate the number of compensable calls per payphone.

With respect to interim compensation for 0+ and inmate calls, the record appears to lack the necessary data to ensure that such interim compensation could be fairly administered and apportioned among the carriers that handled these calls. In the absence of such data, and in view of other equitable factors, the Commission may wish to consider declining to award such compensation.

Sprint disagrees with the arguments of certain IXCs that the Commission has no authority to make retroactive adjustments to interim compensation. Such authority was firmly established by the Supreme Court's decision in the Callery case, and that case was not overruled by the factually distinguishable Bowen case on which these parties rely. The PSPs' equitable arguments against retroactive downward adjustment of their compensation are without merit. However, if the Commission decides to revisit its previously unchallenged determination to base compensation on costs rather than "market" factors – an action not required by the Court's remand – and arrives at a level of compensation greater than the $.35 rate on which its initial interim plan was based, then it should not apply such a rate retroactively. By arriving at such a rate, the Commission would be breaking new ground that can only be undertaken on a prospective basis.

Finally, other issues raised by several parties – such as USTA's request for additional time and guaranteed cost recovery to furnish the ANI digits to PSPs (as LECs were required by the previous orders herein), the paging industry's request to revisit calling party pays, and the requests of certain parties to restrict the IXCs' ability to recover their costs of payphone compensation from their customers, are beyond the scope of the remand proceedings and need not be addressed. However, as noted above, if the Commission decides to entertain the idea that per-call compensation should be "market-based", then it should consider that issue, together with the calling party pays issue, in a further notice of proposed rulemaking.

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REPLY COMMENTS OF SPRINT CORPORATION ON REMAND ISSUES

Sprint Corporation hereby replies to the initial comments of other parties on issues remanded to the Commission by the U. S. Court of Appeals for the District of Columbia Circuit in Illinois Public Telecommunications Association v. FCC, No. 96-1394, decided July 1, 1997 ("IPTA").

I. DEFAULT RATE FOR SUBSCRIBER 800 AND ACCESS CODE CALLS

On the core issue before the Commission – the default per-call rate IXCs must pay for access code and subscriber 800 (and 888) calls -- the battle lines are clearly drawn between the IXCs, who strongly favor cost-based rates, and the payphone service providers (PSPs, including the RBOCs[1] and the independent payphone providers (IPPs)), who seek to persuade the Commission to abandon costs as the basis for compensation and instead to use so-called "market-based" approaches to compensation that have already been rejected by the Commission.

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[1] For convenience, Sprint will refer to the joint comments of the RBOCs, GTE and SNET as "RBOCs."

Before discussing these issues in detail, one preliminary observation is in order. Some parties express concern, based on the Public Notice herein (DA 97-1673, August 5, 1997), that the Commission does not fully recognize the import of the Court's decision in IPTA.[2] The best way for the Commission to dispel this concern is to set the default rate based on an objective examination of the facts, and avoid the invitation of the PSPs to use previously rejected theories as a trumped up justification to reach the same end result on remand that the Commission had previously adopted. If the Commission once again attempts to saddle IXCs and their customers with the costs of a $1+ billion annual corporate welfare program for PSPs, it should expect the IXC industry again to vigorously challenge the Commission's action in the Court of Appeals, and should also expect the Court to apply heightened scrutiny to the remand decision. It is true, as the PSPs point out, that there is no inherent judicial bar to the Commission reaching the same result with better reasoning. However, as the D.C. Circuit has observed:[3]

> At the same time, we must recognize the danger that an agency, having reached a particular result, may become so committed to that result as to resist engaging in any genuine reconsideration of the issues. The agency's action on remand must be more than a barren exercise of supplying reasons to support a

[2] See Frontier at 1 ("Rather than admitting that its orders were found to be deficient in virtually every respect, the Notice merely states that only certain limited aspects of the Commission's orders were found to be 'potentially arbitrary'"); and WorldCom at 1 ("...the Notice seriously misinterprets, and consequently trivializes the significance of the D.C. Circuit's opinion..."); and AirTouch Paging at 3 (The Public Notice "ignores the seriousness of the deficiencies found by the Court...").

[3] Food Marketing Institute v. ICC, 587 F.2d 1285, 1290 (D.C. Cir. 1978).

> pre-ordained result. Post-hoc rationalizations by the agency on remand are no more permissible than are such arguments when raised by appellate counsel during judicial review.

As will be discussed below, Sprint believes that an objective examination of the facts compels the conclusion that payphone compensation must be set at a substantially lower level than that established in the Commission's previous orders.

A. The Commission Should Take A Fresh Look At Marginal Costs

Several parties – Cable and Wireless ("CWI"), CompTel and LCI – share Sprint's view (at 2-5) that the Commission had it right in the NPRM, when it proposed marginal costs as the appropriate cost standard for determining "fair" per-call compensation.[4] These parties, like Sprint, point out that access code and subscriber 800 calls are by-products of a payphone installation rather than its primary purpose, and that the decision to install a payphone is driven by the revenues the PSP can expect from other types of calls (coin and 0+ calls). This being the case, they argue, it is only the additional maintenance and wear and tear occasioned by the increased usage of the phone that is relevant to calculation of the marginal costs for these calls.[5]

The RBOCs' declarant Hausman suggests (para. 29) that marginal costs should also include the opportunity costs that arise from the chance that a potential caller will not

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[4] See CWI at 5-8; CompTel at 10-13; and LCI at 5-6.

[5] These parties raise the possibility that local usage charges (if any) associated with making the phone available for subscriber 800 or access code calls should also be included in marginal costs. Sprint is not aware that any LEC imposes such usage-related costs for the calls in question. On the contrary, it is the IXC carrying the call that pays the LECs access charges for the use of the LECs' networks for call origination.

make a local coin call or other revenue generating call because the phone was occupied by someone making an access code or subscriber 800 call. However, the likelihood of such displacement is quite small. According to Peoples Telephone (at 7), the average call duration for a dial-around call[6] is five minutes. Applying this average duration to the average call data presented by APCC in its Comments (at Attachment 4)[7] means that access code and subscriber 800 calls occupy the average phone for only 760 minutes per month, or less than 1.8% of the time. Stated differently, the typical payphone is available for 0+ and local coin calls 98.2% of the time. And even when it is not available, this does not necessarily mean that the PSP has lost any revenue. If the PSP has another adjacent phone that is not in use, the 0+ or local coin caller can simply use that phone instead of the busy phone. Thus, the opportunity costs are de minimis.

Sprint urges the Commission to take a fresh look at the marginal cost approach that the Commission itself had initially proposed and, if it decides not to use that approach, to explain why it no longer believes marginal costs are the relevant measure of costs. Such explanation is required for reasoned decisionmaking.

B. On A Full Cost Basis The Per Call Rate Should Be Set In the Range of Six Cents

If the Commission determines instead to take a fully allocated approach to costs, then, for the reasons explained in Sprint's Comments at 6-8, sound policy and past precedent require the use of the most efficient "bellwether" service provider as the

[6] Sprint believes Peoples uses the term "dial around" to include both access code and subscriber 800 calls.

[7] The APCC data show an average of 39 access code calls, five prepaid card calls and 108 subscriber 800 calls, for a total of 152 calls subject to per-call compensation.

standard for establishing the per-call charge. Although the RBOCs do not appear to have espoused his position in their comments, their economist Hausman argues the opposite: that the costs of the least efficient (or "marginal") provider should be employed, so as not to risk the removal of any payphones from service (Hausman at paras. 36-41).[8] Hausman's approach overlooks the Commission's long-established policy that in a muti-provider market, inefficiency should not be rewarded and that the way to guarantee that the public reaps the benefit of competition (and that inefficient providers either become more efficient or are replaced by the efficient provider) is to base rates on the costs of the efficient service provider. Hausman also ignores the fact that the payphone industry grew up without any compensation for subscriber 800 calls, and only recently have IPPs been compensated (through the Commission's mandated charges in CC Docket No. 91-35) for certain types of access code calls. Thus, the revenues the Commission awards the PSPs through per-call compensation are largely a windfall, consisting of revenues these providers have never depended upon in the past to support their payphones.[9] In any event, Hausman ignores the availability, under the Commission's orders, for funding of "public interest" payphones that are needed in areas where they are not commercially feasible. Finally, basing the compensation rate, as Hausman argues, on the "marginal" PSP would provide a windfall to all other PSPs at the expense of the public. It is far better policy to set rates based upon the costs of an efficient service provider, so as to

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[8] See also APCC, n.4 at 5.

[9] Although LECs have been required to remove payphone subsidies from other rates, they also have gained opportunities for additional revenues from commissions on 0+ calls and from the deregulation of rates for local coin calls.

weed out inefficient providers, and allow the public, through the public interest payphone mechanism, to support needed payphones that would not be provided by an efficient PSP.

1. Types Of Costs That Should Be Deducted From Local Coin-Call Costs

In determining the per-call rate based on the bellwether PSP's costs, the Commission should deduct costs related to coin functionality, local call completion and premises owner commissions, from the costs of a local coin call. See Sprint's Comments at 9-10.

Various PSPs argue against any such deductions and indeed claim that certain costs should be added to local coin call costs. APCC (at 12) and the RBOCs (at 16-17) argue that costs related to coin functionality should be allocated to coinless calls, because without the revenue provided by coin calls, the phone would not be available in the first place. That argument represents a distorted view of cost allocation that leads nowhere. It is akin to arguing that special access users should be charged for an aliquot share of the costs of a switch, because without the availability of switched service, the ubiquitous transmission network used to provide special access facilities would not exist; or that a person purchasing meat at a supermarket should pay the costs of canned goods and produce, because without those commodities, the supermarket would not exist. Sound costing principles – and common sense – dictate that each user should pay the costs of only the functions he or she uses.

APCC (at 11) also argues that the monthly charges for local exchange service should be allocated to all calls, since they are fixed regardless of the number and type of calls made. Again, this is too facile an approach to cost allocation. In cases where the LEC's charge for local service used by payphone providers is fixed and contains no variable per-local-call element, it is nonetheless true that much of that fixed charge is used to cover the loop costs associated with originating local calls, as well as the costs of switching and interoffice transport of such calls. By contrast, for an access code or subscriber 800 call, the IXC is paying the LEC for the cost of the local handling of that call, other than the SLC paid by the PSP. It is therefore unfair to make the IXCs pay the LECs directly for local access for toll calls and also pay PSPs for local service costs that can be attributed to local call completion.

APCC (at 13) and Communications Central ("CCI") (at 12-13) argue that premises owner commission costs should not be excludable from the determination of the access code/subscriber 800 per-call compensation rates either, because premises owners demand commissions based on all revenues received by payphone providers, and once they see additional revenues coming to PSPs from per-call compensation, they will want some of those revenues. However, as Sprint pointed out in its initial comments (at 9-10), the pre-existing commission payments – which may already result in windfall profits to premises owners – are now being recovered from local coin and 0+ calls. There is no basis in the record for finding that premises owners deserve more commissions than they now receive.[10] If per-call compensation is set at a true cost-based level, PSPs can

[10] NATSO, an association of truck stop operators that also appear to be PSPs, claim that patrons who make payphone calls tie up dining tables for too long and that they are not fairly compensated for the space they devote to their payphones. This is clearly a problem of how truck stop owners choose to run their business and does not indicate that premises owners, in general, are undercompensated for space they allow to be devoted to payphones.

justifiably refuse to increase their commission payments to premises owners. However, building an allowance for commissions expense into per-call compensation will give the premises owners an FCC-endorsed claim that they are entitled to a share of the PSPs' additional revenue stream.

As indicated above, the PSPs would add two elements to the local coin cost in determining the cost of coinless calls. First, the RBOCs would add a cost element to reflect the costs allegedly imposed by LECs on PSPs for delivery of the ANI digits necessary for those phones to be eligible to receive per-call compensation (see RBOC Comments at 17-18). This cost, which is estimated to average $.05 if Flex-ANI is employed (RBOC Comments, Andersen Report at 6), is entirely speculative. To Sprint's knowledge, no LEC is imposing any charges (either per-call or flat) on any PSP today for delivery of ANI digits. Instead, the purported costs on which the RBOCs rely are based on a USTA ex parte filing dated July 28, 1997, which estimated that it would cost $757 million to upgrade all LEC switches to provide ANI digits through Flex-ANI. However, the vast bulk of the expense estimated by USTA ($559 million) related to upgrading some 4,500 switches in non-equal access areas. It is Sprint's experience, from paying dial-around compensation pursuant to orders in CC Docket 91-35,[11] that there are only approximately 10,000 IPP payphones in non-equal-access areas today. Unless, by sheer happenstance, all such payphones are evenly distributed among all non-equal-access exchanges, there may be many exchanges with no IPP payphones, and thus no upgrading would be required in those exchanges to provide ANI digits to the PSPs. There also may

[11] In its orders in that docket, the Commission allowed Sprint to pay on a per-call basis for payphones in equal access areas, and on a per-phone basis in non-equal access areas.

be far less expensive solutions for non-equal-access areas, such as providing an FX line from an equal access end office to the payphone. In any case, it is by no means clear that the Commission would allow the LECs to assign all of the costs of upgrading their end offices to PSPs. It is far more reasonable to assume that the Commission would regard these end office conversions as core network upgrades, the costs of which should not be borne solely by PSPs. This was the treatment accorded to SS7 upgrades that were necessary to support the 800 database.[12] Finally, since these upgrades have not occurred, no such costs should be assigned to per-call compensation until it has been determined how much the LECs are allowed to charge the PSPs.

The other purported added cost of coinless calls is the cost of collecting per-call compensation. APCC (at 14) claims this cost amounts to 8% of billed revenues. See also, Peoples Telephone at 13. There is no basis for adding such costs. In the first place, by placing the tracking obligations on IXCs, the Commission relieved PSPs of expenses that, in a normal commercial setting, the PSPs should have borne.[13] By shifting this considerable effort to IXCs, the PSPs are relieved of a substantial cost and administrative burden. Moreover, based on Sprint's experience, many PSPs "bill" twice, once through a clearinghouse (such as APCC's) and once directly. Similarly, Sprint has found that some clearinghouses bill twice for the same ANI, attributing it to two different PSPs. Obviously, IXCs cannot be expected to pay "in full" each "bill" they receive if they

[12] See, Provision of Access for 800 Service, 8 FCC Rcd 907, 911 (para. 28) (1993).

[13] When a PSP bills an IXC for the "service" of making its phones available for access code or subscriber 800 calls, all it does, in effect, is say "I'm here; here are my ANIs; show me the money." The IXC must verify the ANIs, track the calls and calculate the sum owed.

receive more than one "bill" for a particular phone. This may account for much of the "uncollectible" revenue APCC has experienced. Peoples' complaint that it has not yet collected approximately 10% of the amounts due for the last quarter of 1996 may be due to the obvious arbitrary and capricious nature of the Commission's original plan. Sprint would expect that once a lawful plan is adopted, the carriers required to pay compensation – all of whom are subject to the Commission's jurisdiction – can be expected to fulfill their obligations in good faith, and that the uncollectible rate should be close to zero.

2. The Costs Of The Bellwether Carrier

Sprint's candidate for the bellwether PSP is the Massachusetts operations of New England Telephone and Telegraph Company ("NET"). NET, which has reported to Sprint that it has 45,216 payphones in operation in Massachusetts (putting it on a par in terms of size with other large PSPs[14]), has a reported cost for local coin calls of 16.7 cents per call. See Sprint's Comments at 8-9 and materials appended thereto as Attachment A.[15]

At the time Sprint filed its initial comments, it did not know how much should be deducted from NET's local coin costs for the cost categories discussed above. Sprint suggested (at 10-11) that in the absence of data from NET, the Commission should use its analysis of such costs in CC Docket No. 91-35. The RBOCs filed no meaningful cost

[14] Peoples Telephone, the largest IPP, reports (at 6) that it has nearly 40,000 payphones in operation.

[15] Attachment A was erroneously referred to in the Table of Contents and body of Sprint's Comments as Exhibit A. Sprint regrets any confusion this may have caused.

data of any sort,[16] and none specific to NET. However, APCC represents (at Attachment 2) that NET's local call completion charge is $.05 per call in Massachusetts. With respect to premises owner commissions, based on Sprint's own experience (see Exhibit 1, attached [17]), assigning the premises owner commissions expense only to calls for which PSPs already receive compensation (coin, 0-, 00- and 0+ calls), reduces the costs per coinless call by between 2.4 cents (based on APCC call volumes) and 3.5 cents (based on Sprint's experienced call volumes). Thus, a $.03 deduction appears reasonable for premises owner commissions. As for coin collection costs, APCC (at 14) estimates these costs amount to $.03 per call; Peoples Telephone (at 12-13) estimates that these costs amount to $.02-$.03 per call; and the RBOCs (at 19) also estimate these costs at $.02-$.03 per call. These estimates understate the coin-related costs because they fail to reflect the added equipment costs associated with including coin functionality, and thus they should be regarded as minimum costs. Overall, it appears from these data that the minimum cost to be excluded from the costs of NET's local coin calls is $.10-$.11 ($.03 for commissions, $.05 for local call completion and $.02-$.03 for coin collection). Subtracting these costs from the NET's reported cost of $.167 per local coin call results in a cost-based per-call compensation rate of $.057-$.067.

[16] In the Andersen Report (appended to RBOC Comments), Andersen represents (at 14) that the RBOCs' average cost to carry access code and subscriber 800 calls is $.37 per call. However, this is based on an allocation of costs to various calls types based on estimates of the gross revenue generated from each call. No backup data is provided for this figure either for the individual coalition members or even for the coalition as a group. Furthermore, allocating costs based on the gross revenues the IXCs obtain from each type of call is irrelevant to how the PSPs incur costs and thus is wholly illogical. As a result, the RBOCs' estimate of their so-called "costs" is simply worthless.

[17] See, Section I.B.3, infra, for an explanation of this analysis.

3. Other Relevant Cost Data

In order to give the Commission the benefit of another relevant data point for costs, attached as Exhibit 1 are the costs incurred by the payphones owned by Sprint's Local Telephone Division. As explained in p. 1 of that exhibit, the amounts shown in the "Total Cost" column represent the full book costs of Sprint's payphone operations. The "Incremental Cost" column excludes certain costs, such as collection costs, direct selling expenses and a portion of general and administrative expenses, that Sprint believes are assignable to coin and "0" calls ("Compensated Calls" in the exhibit) rather than to access code and subscriber calls ("Dial-Around Calls" in the exhibit). These costs are converted to unit costs by using both the Sprint LECs' experienced call volumes (p. 2 of the exhibit) and the industry average call volumes shown in APCC's comments at Attachment 4 (p. 3 of the exhibit).[18] Using Sprint's experienced call volumes, its total average costs (including contribution) for all calls amount to \$.243 per call. Using the higher volumes experienced by other PSPs, its unit costs are \$.163 per call. See the last line in the "Total Cost" column of pp. 2-3 of Exhibit 1. Assigning premises (site) owner commissions to coin and "0" calls, and excluding other costs not assignable to dial-around calls, the cost per dial-around call drops to \$.169 based on the Sprint LECs' actual usage, or \$.113 based on APCC average usage data. See "Incremental Costs" column, row labeled "Total Per Dial-Around Call" at Exhibit 1, pp. 2-3.

The Sprint analysis is a conservative estimate of the costs of providing access code and subscriber 800 calls in several respects. First, it allocates these calls a full share

[18] Consistent with the efficient provider concept, Sprint believes the unit costs calculated with industry average volumes are more appropriate for setting per-call compensation.

of the local telephone line costs whereas, as discussed above, much of these costs should be attributed to the carriage of local coin calls. Second, although this analysis does not assign coin collection costs, in the Incremental Cost column, to dial-around calls, it nonetheless assigns an equal share of maintenance and depreciation to such calls even though, as also discussed above, a portion of the costs of the instrument itself and its maintenance can fairly be attributed to coin functionality. Thus, attributing (as Sprint believes is fair) the more efficient usage levels of the APCC members to the Sprint LECs' costs, a rate of $.113 (less an appropriate allowance for local call completion costs) is at the upper limit of a reasonable per-call compensation rate for access code and subscriber 800 calls.

Another relevant data point is AT&T's analysis of its costs of providing coinless payphones, summarized at p.11 of its Comments. This is an update of an analysis presented in its original comments to the Commission in this proceeding last year. APCC (n.11 at 12-13), criticizes AT&T's earlier analysis for reflecting a call volume of 700 calls, which is the number of calls then used by APCC as an industry average. APCC argues that the total costs should be divided instead only by the average of 200 coinless calls experienced by APCCs' members, since the other 500 calls are local coin calls which AT&T's coinless phones obviously could not accommodate. Sprint believes that APCC misunderstands the import of AT&T's analysis. By showing the costs of a phone without coin functionality – without the coin collection costs, repair costs, etc. that can be fairly attributed to the coin mechanism – AT&T's analysis can be used to compare these costs with the costs reported by others (such as NET) for a coin phone in order to estimate the <u>difference</u> in costs between coin and coinless phones. For purposes of calculating these cost differences, it is reasonable to develop unit costs by using the same number of calls as a phone with coin functionality experiences.

On balance, however, NET (when its reported costs are reduced, as discussed in the previous subsection, to better reflect the costs of handling the calls here in question), still appears to be the most efficient, lowest cost PSP. Sprint believes it therefore should be used as the bellwether PSP in this proceeding.

C. The "Market-Based" Approaches Advocated by PSPs Should Be Rejected

The PSPs all argue that nothing in the Court's decision precludes the Commission from using a market-based approach to compensation. For example, APCC claims (at 3) that the Court did not disapprove of the use of market-based rates such as local coin rates as benchmarks for per-call compensation but only found fault with the "specific rationale" used "in implementing a particular market based approach." See also, RBOC Comments at 8.

These depictions of the Court's decision fail to reflect both what the Commission did in the orders below and the Court's decision itself. As Sprint explained in its Comments (at 1-3), although the Commission used a "market-based" approach to local coin rates that was affirmed by the Court, the Commission never purported to use a "market-based" approach to per-call compensation for access code and subscriber 800 calls. Instead, the Commission, from the outset of this proceeding, viewed costs as the appropriate standard, sought an appropriate surrogate for the costs of originating access code and subscriber 800 calls, and explicitly rejected non-cost-based "market surrogates" of the sort the PSPs championed in their comments then and now. Although the RBOCs and IPPs challenged other aspects of the Commission's orders, they did not question the Commission's rejection of a non-cost "market-based" approach to compensation. In IPTA, the Court in no way implied that "market" approaches for compensation are allowable. Rather, the Court excoriated the Commission for having adopted a default rate that had no relationship to costs. As explained at the outset of this Section, in view of the Commission's prior rejection of "market" approaches for setting the default rate, a flip-flop by the Commission on remand would be highly suspect on further judicial review.

The PSPs rely heavily on local coin rates in the abstract (see e.g., the RBOCs' Comments) or $.35 as an assumed proxy for a deregulated local coin rate (see e.g., APCC's Comments), in presenting their cases for both a "market-based" approach and a "top-down" cost approach to setting the default rate per call. However, any approach to per-call compensation which assumes, as a starting point, that the local coin rate is the equivalent of the cost of a local coin call, or that the Commission's previous default rate of $.35 is a proxy for a deregulated market-based local coin rate, is fundamentally flawed to begin with.

The Commission has made no attempt to gather comprehensive data as to either current local coin rates (whether regulated or deregulated) or the costs of local coin calls. The Commission's previous adoption of a $.35 rate as a default rate was based on ex parte representations that this was the local rate in four of the five states that had deregulated local coin rates. See Report and Order, 11 FCC Rcd 20541, 20578 (1996). In fact, the ex parte on which the Commission relied[19] showed that there were six states

[19] August 30, 1996 letter from Michael K. Kellogg.

(not five) that had deregulated local coin rates, and that in two of the six states a $.25 rate prevailed. The Commission never explained why the $.35 rate, rather than the lower $.25 rate should be employed, and its unexplained selection of the higher rate is inconsistent with the notion that competition should force rates down. It is also worth noting, in this context, that NET represented to the Massachusetts DPU that a $.25 rate for local coin calls was a "market-based" rate. See Sprint Comments, Attachment A at 2-3. In sum, there is no sound basis for using $.35 as a default proxy for a market-based local coin rate.[20]

Likewise, the Commission cannot assume that "market-based" local coin rates are indicative of the costs of local coin calls. Clear-cut evidence of the divergence that can exist between "market-based" local coin rates and local coin costs can be found in NET's filing in Massachusetts. There NET sought to raise its rate to a "market-based" $.25, a level that was 50% greater than its self-admitted costs of service of $.167.

With respect to specific market-based proposals, APCC (at 7-9) seeks to rely on two supposedly "market-based" measures that the Commission employed in setting dial-around compensation in CC Docket No. 91-35: commissions paid by AT&T to PSPs on 0+ calls,[21] and the 0- transfer rates charged by LECs. If the "market" APCC and the

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[20] APCC argues (n.6 at 7) that the Court did not overturn the Commission's finding that deregulated local coin rates amount to $.35. This is a misreading of the Court's decision. The Court did not need to reach that issue because it found that the Commission's premise – that the local coin rate was a proper measure of the cost of local coinless calls – was flawed. This finding would hold true whether the deregulated local rate was $.35, $.25 or $.10. Thus, nothing in the Court's decision endorsed (expressly or even implicitly) the Commission's findings that $.35 is an appropriate proxy for a deregulated local coin rate.

[21] The RBOCs (at 24-26) also argue for the use of AT&T's 0+ commissions as the basis for setting per-call compensation, but wildly exaggerate the level of those commissions.

RBOCs seek to measure is the amount that an IXC would willingly pay to a PSP for access code and subscriber 800 calls, then neither 0- transfer charges or 0+ commission payments are relevant. In paying the LECs for 0- transfer, and in paying PSPs (or premises owners) for 0+ traffic, IXCs are paying for traffic that is "up for grabs" – traffic any IXC could handle. In the case of 0- charges, the IXC is paying the LEC a price, based on the use of "live" operators, to receive a call either at the request of a consumer that did not know what access code to dial, or that was assigned to the IXC at random by the LEC operator. And in the case of 0+ traffic, the IXC is bidding for the right to carry all 0+ calls from the phone, calls that could be directed to any other IXC that is also bidding on presubscription. IXCs willingly pay for this traffic because of the typically high charges they receive for handling such calls, and because handling such calls provides the IXCs contact with consumers who may not otherwise be customers of that IXC, thereby giving the IXC a foot in the door to do future business with that consumer.

In the case of access and subscriber 800 calls, by contrast, the consumer placing the call (in the case of access code calls) or the 800 subscriber has already determined that it wants to use the IXC to whom these calls are routed. Thus, the IXCs already have a "lock" on this traffic, and do not feel the need to pay a premium to the PSPs for receipt of this traffic. On the contrary, any premium they pay simply adds to their costs (without adding to their revenues) and can force them to impose higher charges on end users, which only serve to dampen the demand for long distance calling.

They variously claim that these commissions range from \$.90 to \$1.33 (see Andersen Report at 9) or \$.78-\$1.14 (id. at 12), in both cases purportedly relying on data provided by APCC. However, APCC itself states (at 9) that AT&T's commissions on 0+ calls range from only \$.45 to \$.80 per call.

The only reliable indicator of the "market" for subscriber 800 and access code calls was the situation that existed prior to the Commission's orders in CC Docket No. 91-35. At that time, no compensation was paid by IXCs for either type of call. In other words, the market price was zero. PSPs were free to block subscriber 800 calls from their phones, yet did not do so (as far as Sprint is aware) despite the fact that PSPs received no compensation from IXCs for such calls. IXCs did not pay compensation to PSPs for access code calls either. While some PSPs did block such calls, no IXC willingly paid compensation to the PSPs in exchange for unblocking those calls. It was only when the Commission mandated dial-around compensation, over the objections of the IXC industry, in CC Docket No. 91-35, that the PSPs received any compensation for access code calls. Even then, they were still free to block uncompensated subscriber 800 calls but chose not to do so.

In CC Docket No. 91-35, the Commission compelled IXCs to pay dial-around compensation for certain (but not all) access code calls at a per-line rate based upon a per-call rate of $.40. APCC, on behalf of its IPP members, later voluntarily agreed to accept a per-call rate on certain access code calls from AT&T at the rate of $.25 per call. This rate did not apply to either prepaid card or subscriber 800 calls. Indeed, at the time of their agreement, the Commission's position was that it had no authority under Section 226 of the Act to prescribe compensation for subscriber 800 calls, and the Commission had expressed no indication that, as a matter of policy, it would order compensation for such calls even if it had the authority to do so. Thus, at that time, the only source of revenue the PSPs could expect to receive for calls other than 0+, 0-, 00- and coin calls was the compensation on a subset of access code calls. This rate of $.25, applied to the current average of 39 access code calls reported by APCC (at Attachment 4) yields a total average compensation of $9.75. Dividing this amount by the total number of compensable calls pursuant to the Commission's orders herein (152 calls, id.) results in a "market" rate of $.064, which, as it happens, is also within the range of the calculated per-call costs discussed above. Sprint would point out that even this is not a true "market" based rate because it was agreed to by AT&T only after the Commission had intervened in the market and ordered that compensation for certain access code calls must be paid.

If, on the other hand, the "market" is viewed as what consumers are willing to pay, over and above normal charges, for the convenience of using a payphone, then the only true market test is to make them pay up front. A number of parties, including AirTouch Paging (at 2-3), Paging Network, Inc. (at 9-12) and PCIA (at 7-14), urge the Commission to reconsider the calling party pays approach to compensation, which would require the party using the payphone to pay the PSP directly in advance before using the phone for an access code or subscriber 800 call. Sprint believes this issue, which was not remanded by the Court, is beyond the scope of this proceeding. However, if the Commission has any thought of entertaining a "market-based" approach to compensation (and is unwilling to accept the fact that the IXC-PSP market rate is zero), then Sprint agrees with those parties that the Commission should seriously entertain the use of calling party pays, and believes that a further notice of proposed rulemaking should be issued. As those parties correctly point out, calling party pays is the only true market test of what consumers would willingly pay for the convenience of placing a dial-around call or subscriber 800 call from a payphone, instead of using some alternative (such as a portable phone or a home or business phone).

The other market-based factor on which APCC relies (at 9-10) is the surcharge levied for coin (i.e., sent-paid) toll calls, which APCC claims is in the range of $.75-$2.05. These charges are not imposed by the "payphone provider" as APCC claims (at 9) but rather by the carrier that is handling the toll call, and have nothing to do with what the IXC is willing to pay the PSP for receiving the call. Instead, these surcharges, which are imposed in lieu of the similar surcharges that apply to 0+ calls, reflect the IXCs' costs (including live operator costs) of determining, on a real time basis, what the proper charge for such a call is, and having the technology in place to monitor the coin deposit.

The RBOCs argue (at 20-24) that the Commission should take the principle of inverse elasticity pricing into account, as a "market" factor, and claim (based on the Hausman declaration) that this would justify a higher rate for subscriber 800 and access code calls than the rate the public pays for local coin calls. Hausman describes his methodology and data only in the most general of terms and does not supply the underlying calculations to support his results. However, the absurdity of the result Hausman reaches speaks for itself: Sprint's average revenues for a subscriber 800 call are less than the $.35 per-call rate adopted by the Commission in its prior orders. Faced with the prospect of having to absorb an additional $.35 charge for payphone originated calls, Sprint's 800 subscribers are clamoring for the ability to block calls from payphones. And once blocking becomes available, the IXCs' 800 revenues will be reduced. This real-world behavior cannot be squared with the notion (RBOC comments at 23) that IXCs